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NO. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

LARRY PHILLIPS,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Ninth District Court of Appeals
For Summit County, Ohio

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QUESTIONS PRESENTED

I

Whether in a case where self-defense is a viable issue, due process is denied the accused when the trial Judge fails to adequately and correctly instruct the jury that one who is assaulted in their own home is under no duty to retreat.

II

Whether the failure of the trial Court to adequately instruct the jury on essential elements of the defense offered against the charged offense was "plain error" within the meaning of Rule 52 (B), Ohio Rules of Criminal Procedure.

III

Whether an accused is denied due process when the Court fails to properly and fully instruct the jury on the central defenses put forth by the accused.

IV

Whether a guilty of murder verdict, in a circumstantial evidence case, is against the weight of the evidence and is

contrary to law when it fails to exclude a reasonable hypothesis of innocence.

V

Whether in a case where the evidence taken as a whole is sufficient to establish that the actions taken by an accused were reasonable and justified, a trial Court errs in denying a seasonable Motion for Judgment of Acquittal.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED . .	i
TABLE OF AUTHORITIES . .	vi
STATUTORY PROVISIONS WHICH THE CASE INVOLVES	2
OPINIONS BELOW	2
STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED .	3
STATEMENT OF THE CASE . .	3
ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT	18
ARGUMENT NO. I: In a case where self-defense is a viable issue, due process is denied the accused when the trial Judge fails to adequately and correctly instruct the jury that one who is assaulted in their own home is under no duty to retreat. . . .	20
ARGUMENT NO. II: The failure of the trial Court to adequately instruct the jury on essential elements of the defense offered against the charged offense is "plain	

error" within the meaning of Rule 52 (B), Ohio Rules of Criminal Procedure. . . 25

ARGUMENT NO. III:

An accused is denied due process when the Court fails to properly and fully instruct the jury on the defenses put forth. 28

ARGUMENT NO. IV:

A guilty of murder verdict, in a circumstantial evidence case, is against the weight of the evidence and is contrary to law when it fails to exclude a reasonable hypothesis of innocence. . . . 33

ARGUMENT NO. V:

Where the evidence taken as a whole is sufficient to establish that the actions taken by an accused were reasonable and justified, a trial Court errs in denying a seasonable Motion for Judgment of Acquittal. . . . 40

CONCLUSION 42

CERTIFICATE OF SERVICE . . 46

APPENDICES:

Appendix "A" - Decision and Journal Entry - Supreme Court of Ohio . . A1

Appendix "B" - Decision and Journal Entry - Ninth District Court of Appeals A2

TABLE OF AUTHORITIES

PAGE

Alberty v. United States, 162 U.S. 499, at 507-508 (1896) . 22

Brown v. United States, 256 U.S. 335, 343 (1921) . . 36

Commonwealth v. Daniels, 451 PA 163 (1973) . . . 22

Commonwealth v. Johnston, 438 PA 485 (1970) . . . 23

Green v. United States, 405 F.2d 1368, 1370 (D.C. Cir. 1968) 31

In Re Winship, 397 U.S. 358 (1970) 20

Jackson v. Virginia, 443 U.S. 307 (1979) 37

Martin v. Ohio, __ U.S., 107 S. Ct. 1098 (1987) . . . 30

People v. Riddick, 123 Ill. 184, 526 N.E.2d 141 (1988) . 41

People v. Tomlins, 213 N.Y. 240, 107 N.E.2d 496, 497-498 (1914) 23

State v. Miller, 267 N.S. 409 (1966). 24

State v. Muscatello, 57 Ohio App. 2d 2310, aff'd, 55 Ohio St. 2d 201 (1978) 41

State v. Poole, 33 Ohio St. 2d 18 (1973). 32

State v. Williford, 49 Ohio St. 3d 247 (1990) 22

Straus v. United States, 376 F.2d 416, 419 (5th. Cir. 1967) 32

United States v. Bryant, 461 F.2d 913 at 921 (6th Cir. 1972) 27

United States v. Musgrave, 444 F.2d 775, 764 (5th Cir. 1971 . 27

RELEVANT STATUTES

Revised Code of Ohio, §2903.02 3

Revised Code of Ohio, §2941.14.1 3

RELEVANT RULES

Rule 30, Ohio Rules of Criminal Procedure 26

Rule 52 (B), Ohio Rules of Criminal Procedure 25

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To The Ninth District Court of Appeals
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To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Larry Phillips, respectfully prays that a Writ of Certiorari issue to review the judgment of the Ninth District Court of Appeals,

which judgment became final on January 24, 1990 when the Supreme Court of Ohio denied further appellate review.

STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved in this case are:

(1) Fourteenth Amendment, United States Constitution.

(2) Revised Code of Ohio, §2903.02

(3) Revised Code of Ohio, §2941.14.1

(4) Rule 29, Ohio Rules of Criminal Procedure.

OPINIONS BELOW

The judgment entry by the Supreme Court of Ohio denying further review is set forth at Appendix "A" in the Appendix to this Petition, at page A1.

The Journal Entry of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "B", at page A2.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on January 24, 1990. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257 (3).

STATEMENT OF THE CASE [1/]

Larry Phillips, the petitioner herein, was convicted and sentenced on the charge of Murder with a gun specification in violation of Revised Code of Ohio, §§2903.02 and 2941.14.1. The appeal on questions of law from the final judgment entered by the trial court resulted in an affirmance. The Court's Journal Entry and Opinion is attached here as Appendix "B". By this Petition Larry Phillips contends the constitutional issues are substantial and should be reviewed.

1/ References to the transcript of proceedings will be designated by the prefix "Tr".

The salient facts here show that the petitioner shot and killed the decedent (a former girlfriend) after she had surreptitiously entered his home very early in the morning and found him in bed with another woman.

Specifically, the State's proof relative to the actual occurrences leading to the death came from one, Susie Overstreet, the female companion of the accused referred to above. Her proof showed she had been seeing the accused almost on a weekly basis starting earlier that summer (Tr., 134). And, on the 7th of August, they had gone to Cleveland's so-called Flats area, to one of its well known niteclubs -- Coconuts (id., 139). When they returned to his apartment in Akron it was around midnight (12 o'clock a.m.) of August 8, 1988. The petitioner's son was asleep on the living room couch when they passed through on their way to the bedroom (id., 142).

Overstreet testified that several hours later, while they were in bed, she

saw the decedent look in at them (id., 147). And, Overstreet heard her exclaim "Oh my God" and then she walked out (id., 148). Next, according to Overstreet she then told Phillips that was his girlfriend and he responded "no, that's my son" (ibid). She then told him he had better take another look. Continuing, this witness, in support of this unchallenged aspect of the State's case, then testified:

> He (Phillips) looked and she closed the door and he jumped up. Then she (i.e., the decedent) tried to get back inside the door.
>
> * * *
>
> Q. This door cannot lock?
>
> A. No.
>
> * * *
>
> Q. So you said that she is trying to get back in. What are you doing at this time?
>
> A. I had my body up against the door trying to hold the door so she can't come in and tackle me or

something. I don't know what's on her mind.

Q. So you don't know what -- all you know, you are in this situation where you thought this was a girlfriend and you didn't want to get involved?

A. No. He said he wasn't going with her anymore.

Q. When did he say that?

A. About a week before that or so, maybe two weeks before that happened.

Id., 148-150.

In the wake of these events, and because she really wanted to get out of there (id., 150), Overstreet testified she told Phillips to "go out there and talk to her, try to get her out of the house" so she (Overstreet) could leave (ibid).

He then left and she closed the door. After an interval she then heard a rumble like feet moving around (id., 151). Then someone tried to get back into the bedroom. She only let them in after Larry identified himself (id.,

152-154). Continuing, this witness specifically testified as to what then happened after she let him back into the bedroom:

Q. What did the defendant do?

A. He was saying that she had a knife and that she was coming after him with a knife and trying to stab him.

He was just saying, "She has a knife, she has a knife," you know.

Q. Did you see any cuts or wounds on the defendant when he came back into the room?

A. When he come back into the room, he had a little scratch right here above his -- right up here.

* * *

Q. Okay. Now, back in the room, the door is closed. What does the defendant do?

A. Well, he is so nervous, I guess, about this knife thing, you know, like she

is really attacking him. I don't know --

Q. What does he do? Just tell us what he did, what you observed.

A. He just -- he jumps on the bed and --

Q. Show us where he went.

A. Well, he was back in the room, he jumped on the bed and opens up the drawer.

Q. Where is the drawer?

A. Over here. Bottom drawer, gets a gun out and he says that "I got a gun, you better leave."

* * *

Q. Did you hear it click?

A. No. He said, "You better leave, I got a gun," more or less scaring her, you know, made her go away, and --

* * *

Q. Who opens it?

A. He asked me to open up

the door and I told him, "I'm not opening up the door and that if he --" so he opened it.

He wanted to go out there and see if she was still there, I assume, and so he goes out there and he says, "Where is she at?"

Q. Are you able to see him when he is saying this?

A. No.

Q. You are still behind the door?

A. Right.

* * *

Q. Then what happens?

A. Well, he is more or less in the doorway. That's why I didn't see him.

* * *

Q. Okay.

A. So then he says, "Where did she go? Maybe she left. Maybe she left."

I said, "Well, maybe she did."

Q. You couldn't see what was on the other side of the door, could you?

A. No.

Q. Okay. What happened then?

A. Then I guess he saw something, something, because he said, "There she go, there she is," and as if she was running at him with a knife or something.

Q. Well, just tell us what you saw.

A. Right. She -- well, he started running back?

* * *

Q. He is backing up?

A. Backing up, right.

Q. Where is he backing up to?

A. To the bed.

Q. What did he do then?

A. Well, he almost fell. He backed back in there, the gun went off. All I saw was fire and --

Q. What position was his arm that held the gun?

A. He had his hand over it like this, you know, like you hold a gun.

I'm not too familiar with guns. I really don't know. All I know, he had his --

Q. Where was he when the gun went off?

A. Well, when the gun went off, it just like -- he was backing up and almost fell. Back up onto the bed and fell on the bed and then off with the gun. I saw fire and then --

Id., 154-158. (Emphasis supplied.)

Overstreet says petitioner's initial reaction to firing the gun was to state "I think I hit her" or something like that (id., 163). And, when she first saw the decedent after this she was laying in the door way (id., 163). "Her face ... [was] facing the door and she ... [was] on her left side" (id., 164). Phillips then told her

would blow his "brains out" (id., 547).

On another occasion, in March of 1988, he had a woman in the apartment and the decedent got members of Phillips' family to force their way into his apartment under the ruse that he was disabled inside (id., 551-552.) Once inside she accused him of having "a bitch" in the house (id., 554). And, upon being restrained the decedent picked up a pair of scissors and had to be disarmed (id., 554-555).

In July they agreed not to see each other anymore (id., 557). Despite this, there was another scene when the decedent attacked petitioner after seeing him talking to still another female friend in front of his place of business. On this occasion she attacked him with the "spike heel" of her shoes, hitting him six (6) times (id., 558).

In describing the critical events that occurred before he exited the bedroom, Phillips' testimony basically tracks that of Overstreet. Once outside that room, he testified to trying to get

to call the police, which she did (id., 165).

On cross-examination by defense counsel, this witness repeated her earlier testimony that "Phillips was backing up .. toward the bed, [when] he stumbled, the gun went off" (id., 184).

II

For the defense, the petitioner's son testified he heard the decedent enter with a key (id., 492). He then heard some scuffling in the back room following which the decedent came to him and asked him to get out of the apartment (id., 493). She then went back to the kitchen and returned with a knife. At that point she said to him "he is fucking that bitch in there" (id., 494).

Next, our petitioner's evidence showed that contrary to the testimony of the decedent's sister, the decedent had, during their stormy relationship, once pointed a gun at him. During this episode her threat had been that if she ever caught him messing around, "she"

the decedent out of the apartment. She picked up some sort of "contact spray" that belonged to his son and sprayed him in the eyes. He then retreated to get away from her and she grabbed the "butcher knife" and started swinging it at him (id., 569). This caused him to go back into the bedroom (id., 570).

After resisting the decedent's efforts to force her way into the bedroom, Phillips picked up his "handgun" (id., 572). He then hollered through the door several times asking her to leave (id., 571-572).

Phillips, next testified, a point was reached where he did not hear anything outside the door and ventured out (id., 573). Then he saw the decedent squatting near the sink. Next, "all of a sudden", he testified, "she jumps up and starts running at me with this knife and I'm asking her to stop, stop, stop" (id., 574.)

Continuing, Phillips related that "she got to that point and lunged at me, she lunged at me. She was coming at me

so fast I didn't have time to react. I had thought about giving a warning shot, maybe frightening her." Next, the testimony was:

> A. At that time, I knew I had raised the gun, I had known that I had raised the gun, but at that moment, I think I started falling backwards, I started falling backwards, and then I discharged the weapon.
>
> Q. So were you falling backward or were you moving backward?
>
> A. She was so close on me and she made that one lunge, I just pulled the trigger, but I tried to kind of shoot on the side of her, and she was jumping around like animation, you know, so quick, that evidently she must have jumped and hit the bullet, but I did not intentionally try to shoot her.

Id., 575-576.

These facts clearly place the State's argument that the decedent's actions "did not place the defendant in

fear of imminent danger of death or great bodily harm" (id., 11) into a question-of-fact category. And, as such it can only be decided by a fact-finder, whose obligations would include making the necessary credibility determinations.

This being so, it could not be clearer that the State's central argument (-- that is, that the accused had to have been "standing over the deceased when she was snot [Answer Brief, p. 11]) only makes sense if reality can continue to be ignored with impunity. The same is true of counsel's argument that the Coroner's opinion was supported by the eyewitness testimony of Ms. Overstreet (ibid). Actually it should suffice here to say that one must truly wonder what it is about Ms. Overstreet's testimony that even slightly justifies the prosecutor's arguing that Phillips took "aim[]" at the decedent before the gun was fired (id., p. 7).

As shown above, ante., p. 11, Overstreet's testimony was that the

accused was backing up and "almost fell ... and then the gun went off" (Tr., 158). Thus it can hardly be denied the Record certainly supports a different conclusion than that reached by the Coroner who testified that the accused had to be standing over the decedent. In fact, the Coroner's opinion as to where the decedent was is also disputed, not only by other testimony in the Record, but by the physical facts as well.

Here our reference is to the fact that the proof also demonstrates that after the decedent fell, her body was seen, both, by the eyewitness (Tr., 163) and the petitioner's son laying in a position which would have made it impossible for her to have been shot while laying on the floor. This follows because we know the shot entered through the left eye and traveled from front to back (Tr., 216-217).

So postured, it follows that <u>if</u> the decedent had been laying on her left side when she was shot, as the Coroner

suggests, the bullet having traveled from the left side of the head to the right side, could not have occurred if she had been laying in that position when she was in fact shot. Since by all accounts the accused was also standing when she was shot, no other possibility accommodates these facts.

With this as a very real possibility, the Appellate Court's analysis of the sufficiency issues falls far below the requirements of due process.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

In this case there is one fact that is really beyond dispute. The verdict and conviction cannot stand if Larry Phillips' version of the events which engulfed him, and his descriptions of the force he used and the circumstances attendant to this use, are taken as true. The cogency of these contentions make it at once apparent that this due process issue perforce turns on the sufficiency of the evidence to support a finding of guilt beyond a reasonable doubt.

Here we are aided mightily by a really basic tenet, which holds that where (as here) there is a reasonable doubt as to whether an accused is guilty as charged (here of Murder), or was not guilty because he acted in self-defense, such doubt should be resolved in favor of the accused.

In this case, whether or not the testimony of the Coroner is appropriately discounted (by its internal inconsistencies and by its conflict with other testimony and with certain indisputable facts) is not all that important. The critical fact is there is nothing in the Record but conjecture to overcome the proof that Larry Phillips acted in self-defense. Or, if not in self-defense, still there is nothing in this Record that otherwise proves his conduct was criminal.

This follows because where, as here, the evidence does not carry with it that reasonable certainty of guilt, it is insufficient to support the finding of guilt beyond a reasonable

doubt required by due process. See, In Re Winship, 397 U.S. 358 (1970). Indeed, in Winship, the point made (that is clearly applicable here) is that the "due process clause protects the accused against conviction except upon proof beyond a reasonable doubt ... of the crime for which he is charged."

ARGUMENT NO. I

In A Case Where Self-Defense Is A Viable Issue, Due Process Is Denied The Accused When The Trial Judge Fails To Adequately And Correctly Instruct The Jury That One Who Is Assaulted In Their Own Home Is Under No Duty To Retreat.

(A)

On the self-defense issue, the Court gave the jury the really tired, and dated, instructions that come basically from the Ohio Jury Instructions.

Specifically, the Record shows the jury was told that:

> To establish his claim of self-defense, the defendant, Larry Phillips, must establish by a preponderance of the evidence the following: First, that the defendant, Larry Phillips, was not at fault in creating the situation giving rise to the confrontation between himself and Miss Bushner in the defendant's apartment.
>
> Secondly, he has to prove that the defendant had a honest belief that he was in imminent danger of death or great bodily harm from the deceased, Miss Bushner, and that his only means of escape from such danger was in the force that he used and, third, the defendant must also establish by a preponderance of the evidence that he did not violate any duty to retreat or to avoid the danger.

Tr., 680-681. (Emphasis supplied.)

The law is certainly clear enough that one who is violently assaulted in their own home by, either, a trespasser or even an invitee has no duty to retreat. They are privileged to stand their ground and use such force as to them seems necessary to defend

themselves and others in their home.

This point was not as clear when this case was reviewed by the Ohio Supreme Court, as it is now. See State v. Williford, 49 Ohio St. 3d 247 (1990). So postured, a dispositive aspect of the issues here being discussed involves the Court's sterile self-defense instruction that clearly indicated the petitioner was under a duty to retreat. Also, it seems clear enough the trial Court was apparently oblivious to the fact that where one is dangerously, or feloniously, attacked or even threatened with such an attack in their home, they need not retreat and may meet force with force. Historically this principle has come to be known as the "castle" doctrine. See, Alberty v. United States, 162 U.S. 499, at 507-508 (1896). Also see, Commonwealth v. Daniels, 451 PA 163 (1973).

On this point, it was Justice Cardoza, a sage of a bygone although enlightened era, who once remarked:

> It is not now and never has been the law that a man

> assailed in his own dwelling is bound to retreat. If assailed there, he may stand his ground and resist the attack. He is under no duty to take to the fields and the highways, a fugitive from his own home.

People v. Tomlins, 213 N.Y. 240, 107 N.E.2d 496, 497-498 (1914). Also see, State v. Williford, 49 Ohio St. 3d 247 (1990).

(B)

For our part, it is certainly clear enough that Larry Phillips was absolutely entitled to much more than the usual boiler-plate instruction that required him to prove he did not violate any duty to retreat, as was stated by the Court in his insubstantial discussion of the elements of self-defense (Tr., 680-681.) Indeed, he was absolutely entitled to instructions that specifically alerted the jury to the fact that where a man is dangerously and feloniously attacked in his home, and he is placed in imminent danger of serious personal harm or death from an unjustified felonious attack, he

would be justified in standing his ground and meeting force with force.

Even this is not all. We further contend the jury should have been specifically instructed that such justification could exist notwithstanding Phillips may have been able to safely retreat without suffering any harm from the attack. See, Commonwealth v. Johnston, 438 PA 485 (1970) and State v. Miller, 267 N.E. 2d 409 (1966).

Clearly then the instructions given by the trial Court regarding self-defense cannot be said to have covered the full substance of the defense put forth. Equally clear is the fact that the instructions here being referred to (and quoted above, supra, p. 21), recommend a conviction if the jury found that Phillips failed to retreat -- at least the given instruction can be so read.

When viewed in that sense the instructions appear to give credence to the Coroner's theoretical version of the events without acknowledging that

regardless of where the decedent was when she was actually shot, her presence in Phillips' apartment as a felonious assailant eliminated any duty to retreat he might have otherwise had.

ARGUMENT NO. II

The Failure Of The Trial Court To Adequately Instruct The Jury On Essential Elements Of The Defense Offered Against The Charged Offense Is Inevitably "Plain Error" Within The Meaning Of Rule 52 (B), Ohio Rules Of Criminal Procedure.

We start here with the idea that due process imposes a very heavy duty on the trial judge to adequately instruct the jury not only on each element of the charged offense, but, on all elements of the defenses put forth as well. When viewed in this context, it is at once apparent that mere boiler-plate references in the given charge to the various elements of the self-defense plea were grossly insufficient. This is particularly so, since the references made

failed to sufficiently define and delineate all the relevant aspects of the defense itself.

Conspicuously absent from the trial Court's self-defense instructions is any reference to the fact that Phillips, being in his own home, was under no duty to retreat from a trespasser. This failure certainly can be said to have gone to the very heart of the defense made by Phillips to the charge. Granted, it will again be argued that the absence of any objections to the given charge by petitioner's trial counsel constitutes a waiver under Rule 30, Ohio Rules of Criminal Procedure. Our response to this is that the obligation of the trial judge to sufficiently charge the jury as to the essential elements of the charged offense and all defenses involved, is a particularly heavy responsibility. Indeed, it exists apart from, and even in the absence of, any request or objections by defense counsel.

Stated another way, we concede trial counsel should have possibly been

alert to point out to the trial judge this patent deficiency in the given charge. And, obviously this would have afforded the Court an opportunity to take corrective action.

Still there is one insuperable fact that remains. Simply put, the obligation to furnish the jury with a sufficient instruction as to the elements of the charged offense, and as to the defenses put forth, is a special function of the trial judge. This responsibility of the judge is not one that is fully shared by counsel. See, United States v. Musgrave, 444 F.2d 775, 764 (5th Cir. 1971). Also United States v. Bryant, 461 F.2d 913, 921 (6th Cir. 1972). Because this is so, the gross deficiencies in the Court's charge effected "substantial rights" and resulted in the conviction here involved. These defects we contend are of the type that the ends of justice require that this conviction be reviewed.

ARGUMENT NO. III

An Accused Is Denied Due Process When The Court Fails To Properly And Fully Instruct The Jury On The Defenses Put Forth.

(A)

What really points up and magnifies the cogency of this argument is the blind adherence by the trial Judge (and he is not unique) to those instructions in Ohio's pattern book. While trial counsel is certainly not without fault in failing to provide certain specific instructions, as argued above, the Court's duty to properly instruct the jury on the elements of the charge made in the indictment and the defense made with reference thereto is not one that is shared equally with counsel.

Given this indisputable fact, as shown above (i.e., under Arguments I and II) it is clear enough in the context of this case, that the customary instructions given in routine self-defense cases were ill-suited for the

type of defense made here. Indeed, one can quickly realize the ossified-like pattern instructions relied on by the court actually reduced the undeniable fact that our petitioner was feloniously attacked while he was in his own home to an insignificant fact. This follows because literally our accused was required to prove (a) that he did not violate any duty to retreat and (b) that his only means of escape was to take the action in fact taken. (See Tr., 680-681.)

Why this matter comes to the fore here with so much vigor is very simply put. Apart from the self-defense issue as it related to the petitioner, which we contend was not correctly charged in any event, the given charges also failed to advise the jury that Phillips actually had the right to forcibly evict an intruder without regard to his own personal safety. And, that in so doing he was entitled to use whatever force was necessary.

All this causes the odds against the jury realizing from the Court's

hollow self-defense charges that Phillips was entitled to be acquitted if he acted in defense of his life to stretch almost to infinity.

Of course, it can be said that part of the problem with Ohio's canned self-defense instructions is the fact that they were, at least to some extent, endorsed by this Court's opinion in Martin v. Ohio, __ U.S. __, 107 S. Ct. 1098 (1987). Still it is a critical point that despite this Court's criticisms of segments of these instructions, the prosecution-oriented Judges in our State (and those who craft these instructions) have done nothing to correct the infirmities commented on by this Court.

(B)

Also of significance to the arguments here being made is the fact that the Court, in rejecting the State's request for a charge on Voluntary Manslaughter (Tr., 462), expressly noted that the defense made here included the contention that "while he [Phillips] was

defending himself, he accidentally killed the victim" (ibid). Also see Tr., 669-670.

We are, of course, aware that the Record here does not show counsel made the specific request that the Court charge on accident. And, we will readily concede no exception was taken to the Court's apparently inadvertent omission of this required charge. Still the Law is clear enough that the Court's obligation is to fully and adequately instruct the jury on all the essential elements of the charged offense and the defense made. Indeed, the point was well made above that while counsel should certainly be alert in calling to the Court's attention for corrective purposes, flaws (both of commission and omission), the Court's special responsibility for instructing the jury as to the essentials is simply not one that is fully shared with counsel. See, Green v. United States, 405 F.2d 1368, 1370 (D.C. Cir. 1968) and United States v. Musgrave, 444 F.2d 755 (5th Cir. 1971).

In assaying the particular argument here being made, the Court should understand our point is that the lack of an instruction on accident translates into a due process violation. This follows because there was an abundance of evidence that Phillips did not intend to actually shoot the alleged victim, and that the gun accidentally discharged. This being so the Court's failure to give the instruction on accident cannot be defended. This follows because there is really no way to characterize the unavoidable effect of this omission from the charges given the jury except to agree it translates into the Court having directed a verdict against the accused on the accident issue. See, Straus v. United States, 376 F.2d 416, 419 (5th Cir. 1967).

Clearly then, since Phillips was shortchanged by the Court's failure to charge on accident (see O.J.I., §411.03), it follows there was a failure of due process in his conviction for this reason as well. Also see, State v.

Poole, 33 Ohio St. 2d 18 (1973).

ARGUMENT NO. IV

A Guilty Of Murder Verdict, In A Circumstantial Evidence Case, Is Against The Weight Of The Evidence And Is Contrary To Law When It Fails To Exclude A Reasonable Hypothesis Of Innocence Put Forth By The Defense.

In this case, Larry Phillips' defense was that he acted to defend himself from great bodily harm or worse. As postured by our facts, the critical questions turned on whether, given the quickly unfolding events, his responses were reasonable in the light of the exigencies that existed as interpreted by him. As we understand it, all the law requires to justify a shooting or killing in self-defense, or in the defense of another, is that the person be confronted with such means of force as induces in them a reasonable belief they are in danger of loss of life or

receiving great bodily harm.

With this as a given, the considerable evidence in this case can only be interpreted as showing Phillips (our petitioner) was suddenly confronted by a threatening, belligerent intruder in his home. Indeed, this intruder was a person who had previously committed violent acts against him. This fact is really beyond dispute. Thus it simply cannot be denied that apprehension that he would be seriously hurt was at least real to the petitioner.

Even this is not all. We certainly agree that one who is merely threatened by a person cannot take the law into his own hands. However, in deciding whether one acted in self-defense, the law simply does not require, in the face of rapidly unfolding events, that they should use unerring judgment.

In making the above contentions, two separate and distinct propositions are being urged. One thesis is that the decedent's unexpressed motives for coming into the petitioner's home, and

the manner that she did so, demonstrates the type of conduct (particularly in the light of her previous acts of violence against Phillips) that must be viewed as aggressive. This being so, it seems clear enough that only if the petitioner's belief that he (or his guest -- for that matter) were in some appropriate danger was indeed unreasonable could the self-defense (or defense of another) issue be resolved against him. The other thesis being relied on contends that the State simply failed to prove the killing was unlawful.

Obviously, no one can possibly dispute the fact that if one has reasonable grounds for believing a danger of death or great bodily harm from the acts of another exist, he does not commit a criminal act, or an unlawful act, when he picks up a gun to defend himself. This is particularly so when he is in his home (the situation here). And, just as surely, where as here the evidence, even that offered by the State, establishes the ultimate

killing was in direct response to an imminent, and most threatening, aggressive act and attitude of the decedent, such proof fails to establish a felonious homicide of any type. This being so, here the conclusion has to be that the State failed to sustain the burden of proving all the elements of the offense charged in this case.

Again, the critical facts here show where the decedent was, and what the decedent was doing, when she was shot. These facts amounted to acts of felonious aggression toward the petitioner.

Clearly then, in his efforts to avoid the possible consequences thereof, Phillips was surely justified in standing his ground and destroying the person making the felonious attack. In this regard, the words of O. W. Holmes, perhaps the wisest of all Justices ever, are particularly applicable here. In his judgment, "[d]etached reflection cannot be demanded in the presence of an uplifted knife." Brown v. United States, 256 U.S. 335, 343 (1921).

Also, on the sufficiency question here Courts, as we read Jackson v. Virginia, 443 U.S. 307 (1979), are actually required to reverse this conviction where, as here, it is shown there was a lack of substantial evidence establishing all of the events of the offense beyond a reasonable doubt. See, In Re Winship, 397 U.S. 358 (1970). With tenets distilling from the above cited cases, it is clear enough that when all the evidence is weighed according to these factors, the proof here did not reach that high degree of probative force required to sustain a criminal conviction.

In any event, the critical issues in this case turn on whether the evidence, including that offered by Larry Phillips, was sufficient to support his self-defense plea. As to this it seems clearly to be the law that even if an accused fails to prove himself not guilty (as they are required in Ohio, the only State in the union with this requirement), this does not relieve the

State of its burden of proof. And, that burden was surely not met here.

Indeed, in this case indisputable facts show it was not unreasonable for Larry Phillips to view the acts of the decedent, who had previously assailed him with weapons, as a clear-cut indication of an offer to commit felonious acts of violence against him.

The most essential questions in this Petition clearly turn on whether a reasonable trier-of-fact could have concluded Larry Phillips was guilty of murder. In more correctly posturing this issue, it will be conceded that the jury was not obligated to accept Phillips' version of the events. On the other hand, it is also true that any contention that Larry Phillips' version of the events, which showed he acted in self-defense (or was at least designed to show this), did not satisfy the proof requirements for self-defense would rest solely on the testimony of the Coroner. And, for the Coroner's testimony as to the full load, it must be deemed to have

been sufficient to actually overcome Phillips' and Overstreet's (a State's witness) testimony. In short, the proof here only showed the original aggressor was the alleged victim and that Phillips reacted to the threat posed thereby. This thesis is bolstered by the fact the testimony of all those present at the moment of truth, who were available to testify (i.e., the accused and Overstreet) established that the decedent was not only a felonious intruder, but was in fact the aggressor. Hence it is beyond dispute the petitioner's belief he was under attack can in no way be regarded as unreasonable.

This being so his right to have the jury correctly instructed as to the applicable law is likewise beyond dispute.

With this fact as a given, it cannot be denied that if Larry Phillips had been given the benefit of the doubt he would not have been convicted for acting as he did in response to the rapidly unfolding events that confronted him.

The bottom line then is no one can possibly dispute the fact that Phillips certainly had grounds for believing he was about to be physically assaulted by an aggressive trespasser, who had evidenced her enragement prior to this moment of truth. This being so, his response actions should not be deemed unreasonable. This follows unless the law truly is that one faced with the presence of another who obviously intends to be a felonious assailant, must actually turn tail and run even from his own home. Simply put, any argument that Phillips was not privileged to repel a violent intruder in seeking to avoid a confrontation would be inconsistent with the law.

ARGUMENT NO. V

Where Evidence Taken As A Whole Is Sufficient To Establish That The Actions Taken By An Accused Were Reasonable And Justified They Are Entitled To Be Acquitted.

In Martin v. Ohio, __ U.S. __, 107, S. Ct. 1098 (1987) Ohio's self-defense law was validated by the United States Supreme Court at least insofar as aggravated murder is concerned. Cf., People v. Riddick, 123 Ill. 184, 526 N.E. 2d 141 (1988) with State v. Muscatello, 57 Ohio App. 2d 2310, aff'd, 55 Ohio St. 2d 201 (1978).

Granted it is clear enough that under Martin, the accused is required to prove himself not guilty if he is to prevail on a self-defense plea. Still we contend it was not reasonable for the jury to have determined (as they arguably did) that Larry Phillips did not reasonably believe he was in imminent danger of being harmed himself by his trespasser adversary.

Here our reference is to the defendant's testimonial version of the crucial events showing that he became embroiled in a desperate struggle with a most violent woman. Clearly and indisputably she was not only the original aggressor, but a violent

intruder whose actions translate into felonious conduct. This fact is literally beyond dispute. Indeed, it was corroborated by the testimony of the witness Overstreet whose unimpeached evidence was presented by the State.

So postured the evidence here is simply insufficient to support the jury's finding that the alleged victim was murdered. Additionally, the critical testimony presented by the Coroner, it is here submitted, is hardly significant enough for this Court to make the declaration that his testimony alone supplies proof sufficient to validate Phillips' conviction.

Stated another way, the conclusion here seems inescapable that the evidence is, and was, so unsatisfactory and improbable as to raise a reasonable doubt concerning the petitioner's guilt and should require this Court to substitute a different judgment.

CONCLUSION

This cause shows the extent to which one can easily be victimized by a

failure, even of a well intentioned Judge, to adequately submit the issues in a trial to the jury. Indeed, it happened in this case that the Court, deeming himself riveted to the self-defense instructions as set forth in the Ohio Jury Instructions, failed to give the jury instructions tailored to accommodate the accused's theory of defense.

The essential questions that have emerged here seem clearly to turn on whether any reasonable trier-of-fact could have concluded our petitioner was guilty of murder -- as this jury determined he was. While we concede the jury was not obligated to accept Phillips' version of the events, it is also true that inasmuch as the only evidence (if there is any) disputing the defendant's evidence was circumstantial (i.e., the theoretical testimony of the Coroner), the facts tending to support the guilty verdict actually must do double duty. First, they must show the accused's version, which included the

testimony of the State's central witness, Susie Overstreet, was in effect incredible and not creditable. As to this, it is the law of this State that where, as here, the only proof involved is circumstantial evidence the facts taken as a whole must not only be consistent with guilt, but inconsistent with any reasonable hypothesis of innocence.

In this case any contention that the accused's evidence, augmented as it was by the cogent testimony of Susie Overstreet, did not accurately portray the critical development of this occurrence rests (it is worth repeating) solely on the testimony of the Coroner. And, his testimony must overcome the cogent evidence showing that the decedent first attacked Phillips with a knife. Also, it must reckon with the undisputed fact that the decedent was indeed an aggressive trespasser, and doubtless bent on committing serious acts of aggression, when she met her death.

To view this situation otherwise, one must assume that despite the fact the decedent was a trespasser, who had secretly intruded these premises in the early morning hours, the accused was nonetheless the aggressor. And, for that reason the defense made was properly rejected by the jury. If not that, then it has to be that the defense failed because the evidence relied on did not provide a hypothesis of innocence sufficiently inconsistent with the Coroner's theory as to the position of the decedent's body when she was shot.

Also, it seems clear enough that the Court's instructions on self-defense failed to adequately posture the case for the jury to resolve the contending issue. Additionally, the lack of an instruction on accident, which the Court recognized was a viable contention, was a due process violation.

The bottom line here then is that this close case (which pivoted on the testimony of not only the petitioner,

but the State's chief witness) was marred by several evidentiary errors and the instructions given the jury. These errors, as shown above, also contributed to the conviction of Phillips and cannot possibly be considered harmless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Petition for Writ of Certiorari was mailed to the office of Lynn Slaby, Summit County Prosecutor, City-County Safety Building, 53 East Center Street, Akron, Ohio 44308, this 24th day of April, 1990.

JAMES R. WILLIS, ESQ.
ANDREW JOHNSON, ESQ.
Attorneys for Petitioner

A P P E N D I X

THE SUPREME COURT OF OHIO

1990 TERM

To wit: January 24, 1990

State of Ohio, :
Appellee, : Case No. 89-1973

v. : E N T R Y

Larry B. Phillips, :
Appellant, :

Upon consideration of the motion for leave to appeal from the Court of Appeals for Summit County, and the claimed appeal as of right from said Court, it is ordered by the Court that said motion is overruled and the appeal is dismissed sua sponte for the reason that no substantial constitutional question exists therein.

COSTS:

Motion Fee, $40.00, paid by James R. Willis.

(Court of Appeals No. 14062)

THOMAS J. MOYER
Chief Justice

APPENDIX "A"

STATE OF OHIO) IN THE COURT OF APPEALS
) ss: NINTH JUDICIAL
COUNTY OF SUMMIT) DISTRICT

STATE OF OHIO	) C.A. NO. 14062
Plaintiff-Appellee	)
v.	) APPEAL FROM JUDGMENT ENTERED IN THE COMMON PLEAS COURT
LARRY B. PHILLIPS	) COUNTY OF SUMMIT, OHIO
Defendant-Appellant	) CASE NO.CR 88 08 1152

DECISION AND JOURNAL ENTRY

Dated: September 20, 1989

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

MAHONEY, J Appellant Larry Phillips appeals from the jury's verdict finding him guilty with a gun specification. We affirm.

FACTS

In the early morning hours of August 8, 1988, Larry Phillips and Susie Overstreet returned to Phillips' Akron

apartment. The couple entered the apartment and proceeded past Phillips' sleeping sixteen year old son and entered Phillips' bedroom.

Around 4:00 a.m., Renitta Bushner, Phillips' ex-girlfriend, used a key to enter Phillips' apartment. She proceeded to Phillips' bedroom and opened the door.

Susie Overstreet testified that she feared Renitta and held the bedroom door closed. She urged Phillips to talk with Renitta. Phillips left the room. Subsequently, Phillips re-entered the bedroom and told Overstreet that Renitta had a knife. Overstreet never saw Renitta with a knife. Overstreet and Phillips, a man of 220 pounds, held the door to prevent the 106 pound Renitta from entering the room. Phillips then grabbed his loaded gun from a drawer and left the room. As the gun fired, Phillips was backing into the bedroom. Overstreet testified that the gun was pointed downward. Phillips shot Renitta in the left eye.

Phillips testified that after he

shot Renitta, he removed the knife she had used to threaten him. Realizing he had moved evidence, Phillips testified he placed the knife by her body and placed the key next to her.

At trial, Phillips proceeded on the theories of accident and self-defense. The jury was instructed on self-defense. No objections were made to these instructions. The jury rejected the self-defense theory and found Phillips guilty of murder with a firearm specification.

The court sentenced Phillips to fifteen years to life on the murder charge and three years on the firearm specification.

Phillips' motion for acquittal and a new trial were denied. On appeal, Phillips assigns six errors. We will address these errors singly or in combination, as each becomes relevant to our analysis.

ASSIGNMENT OF ERROR I

> "The court erred in admitting, ostensibly under favor of Rule 607, Ohio Rules of Evidence, as substantive proof, the opinion testimony of the coroner as to the manner of death."

Based on his personal examination of Renitta and his knowledge and experience, Dr. Cox testified that in his professional opinion, based on a reasonable scientific certainty, Renitta had to have been lying on the floor and shot by someone standing above her. Phillips argues that this testimony is inadmissible for all purposes. We disagree.

The coroner's factual determinations are prima facie evidence of the manner, mode and cause of death. Vargo v. Travelers Ins. Co. (1987), 34 Ohio St. 3d 27, paragraph one of the syllabus. The defendant may come forward with competent, credible evidence to rebut the coroner's determinations. State v. Mack (Sept. 1, 1982), Summit App. No. 10599, unreported. If the defendant presents rebuttal evidence, the cause of death becomes a question for the jury. State v. Jennings (July 12, 1989), Summit App. No. 13912, unreported.

In this case, the coroner gave his opinion that the gun was pointing downward when it was fired. He based his opinion on the shape of the entry wound

and the path of the bullet. Susie Overstreet also testified that the gun was aimed downward. The testimony of other witnesses conflicted. The jury weighed the credibility of the witnesses and resolved issue. Ample evidence supports the jury's finding. Accordingly, we overrule the first assignment of error.

ASSIGNMENTS OF ERROR

"II. The court erred in refusing and failing to adequately and correctly instruct the jury on the issue as to whether the appellant was under a duty to retreat.

"III. The failure of the trial court to adequately instruct the jury on essential elements of the defense offered against the charged offense was 'plain error' within the meaning of Rule 52(B), Ohio Rules of Evidence.

"IV. The accused was denied due process when the court failed to properly and fully instruct the jury on the defenses put forth."

Phillips contends that we must find plain error because the trial court failed to properly instruct the jury on self-defense. Phillips claims that the standard jury instruction as set forth in the Ohio Jury Instructions is inappropriate under the circumstances of this case where Phillips argues that Renitta was a trespasser who attacked him in his own home.

> The trial court instructed the jury as follows:
>
> "To establish his claim of self-defense, the defendant, Larry Phillips, must establish be a preponderance of the evidence the following:
>
> "First, that the defendant, Larry Phillips, was not at fault in creating the situation giving rise to the confrontation between himself and Miss Bushner in the defendant's apartment.
>
> "Secondly, he has to proved that the defendant had a honest belief that he was in imminent danger of death or great bodily harm from the deceased, Miss Bushner, and that his only means of escape from such danger was in the force that he used and, third,

> the defendant must also establish by a preponderance of the evidence that he did not violate any duty to retreat or to avoid the danger."

Phillips did not object to this instruction but urges us to overlook the mandates of Crim. R. 30 and find plain error pursuant to Crim. R. 52(B). The burden on Phillips is heavy because he must establish that, but for the error, the outcome of the trial would clearly have been otherwise. State v. Long (1978), 53 Ohio St. 2d 91, 97. "Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice." Id. at paragraph three of the syllabus.

The record before us fails to establish plain error. Clearly, the victim, Renitta was an unwelcome intruder into Phillips' home. By her appearance there, these events were set into motion.

The testimony is conflicting as to whether she had a knife or was attacking Phillips. But even if Renitta had a knife, there was sufficient evidence

whereby the jury could have found that Phillips failed to establish all the elements of self-defense.

Overstreet testified that after Phillips left the bedroom to discuss the situation with Renitta, Overstreet held the bedroom door shut so as to prevent Renitta's entry. Phillips re-entered the room, and grabbed one of his loaded guns. Again, he opened the bedroom door to exit but not before hesitating and warning Renitta that he had a gun. Overstreet testified that she saw Phillips look around, back up and with the gun pointed down, fire. She did not see Renitta nor observe what position Renitta was in prior to the shot. Phillips testified that he removed the knife after he shot Renitta, but replaced it prior to the arrival of the police.

There was testimony from Phillips that he believed that there were no guns accessible to Renitta. There is no claim that he feared for the safety of his son. There is testimony that immediately before the shooting, the 220 pound Phillips and Overstreet, together,

held the door closed, while Renitta tried to get in. Then, Overstreet held the door while Phillips, rather than using the available telephone to seek assistance, sought his loaded gun with which to quell the threat of his 106 pound attacker.

Phillips left the bedroom. Although conflicting with Phillips' testimony, there was competent evidence which established that Phillips shot Renitta through the left eye as she lay on the floor. This evidence was adduced from the coroner's testimony on the shape of the entry wound and path of the bullet through Renitta's brain and the bullet's failure to exit.

As Phillips himself concedes, a person attempting to establish the defense of self-defense must use such force as to him seems necessary to defend himself. Clearly, the jury was presented with substantial, competent and credible evidence whereby it could find that Phillips used excessive force in response to a less than imminent danger of death or great bodily harm. We do not need to reach the duty to retreat

in one's own home. State v. Jackson (1986), 22 Ohio St. 3d 281, 284. We cannot find plain error where Phillips has failed to prove, by a preponderance of the evidence, one element of self-defense.

Nor will we find plain error because the trial court failed to sua sponte instruct the jury that Phillips asserted the theory of accident. We cannot say that where trial counsel fails to object that these facts are such that the trial court should have so instructed the jury. Nor can we say that, but for the trial court's failure to give such an instruction, that the jury verdict would have been otherwise.

Accordingly, we overrule Phillips second, third and fourth assignments of error.

ASSIGNMENT OF ERROR V

> "The guilty of murder verdict here is against the weight of the evidence and is contrary to law."

Phillips contends that there is a lack of substantial evidence establishing all the elements of murder beyond a

reasonable doubt. Phillips claims that if this court fails to reverse this conviction as against the manifest weight of the evidence that we are suggesting that no person may ever overreact, or even react, to the threats of danger in one's own home.

When an appellant raises a manifest weight argument, this court reviews the entire record:

> "***weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction."
>
> "***."

State v. Martin (1983), 22 Ohio App. 3d 172.

We find there is substantial evidence that Phillips purposely killed Renitta Bushner. Phillips testified that he chose a gun, knew it was loaded,

and probably cocked it before leaving the bedroom. Phillips testified that Overstreet and he held the door to fend off Renitta's entrance to the bedroom. When it appeared that Renitta was no longer there, Phillips opened the door to notify Renitta that he had a gun. Several minutes passed before he exited. He stated that he should probably never have opened the door. Phillips claimed that Renitta jumped out from behind the counter and that he knew he had raised the gun and pulled the trigger. The coroner testified that Renitta was lying on the floor when shot at close range through the left eye. Susie Overstreet testified that Phillips was pointing the gun downward as it fired.

From our review of the record and the reasonable inferences drawn therefrom, we cannot say that the jury clearly lost its way and created such a manifest miscarriage of justice that reversal is required. Accordingly, we overrule Phillips' fifth assignment of error.

ASSIGNMENT OF ERROR VI

> "The evidence in this cause, it is here being contended, was sufficient to establish that the actions taken by the appellant were reasonable and justified; hence, the court erred in denying the appellant's motion for judgment of acquittal."

Phillips contends that he is entitled to a judgment of acquittal because the proof was insufficient to establish guilt beyond a reasonable doubt.

Assuming arguendo that Phillips has not, as the state contends, waived this error on appeal, we find substantial, credible evidence supports the jury's verdict. State v. Bridgeman (1978), 55 Ohio St. 2d 261.

Contrary to Phillips argument that the coroner's testimony was insignificant, we find that it was competent, credible and sufficiently corroborated by Overstreet's testimony. Other evidence was substantial to support the jury's finding. The jury heard the testimony, listened to Phillips' version and chose to render a guilty verdict.

Accordingly, we cannot say that Phillips is entitled to a judgment of acquittal. His sixth assignment of error is overruled.

SUMMARY

Based on the foregoing reasons, we overrule each assignment of error and affirm the decision of the trial court.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this court, directing the County of Summit Common Pleas Court to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this

document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

EDWARD J. MAHONEY
FOR THE COURT

CACIOPPO, P. J.
REECE, J.
CONCUR

(Mahoney, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Article IV, Section 6(C), Constitution).

APPEARANCES:

PHILIP D. BOGDANOFF, Asst. Prosecutor, City-County Safety Bldg., Akron, OH 44308 for Plaintiff.

JAMES R. WILLIS and ANDREW L. JOHNSON, JR., Attorneys at Law, Bond Court Bldg., Suite 610, 1300 E. Ninth St., Cleveland, OH 44114 for Defendant.

Supreme Court, U.S.
FILED
MAY 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1655

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

LARRY PHILLIPS
Petitioner

-vs-

STATE OF OHIO
Respondent

On Petition for Writ of Certiorari
To The Ninth District Court of Appeals
For Summit County, Ohio

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE(S)
Table of Authorities----------	1b
Statement of the Case----------	2
Statement of the Facts----------	4
Arguments Why Writ Should Not Be Allowed----------	9
Argument I----------	10
Argument II----------	17
Conclusion----------	23
Appendix----------	24
O.R.C. 2903.02----------	25
O.R.C. 2913.51----------	26
O.R.C. 2941.141----------	27
Ohio Rules of Criminal Procedure	
Rule 29(A)----------	28

TABLE OF AUTHORITIES

PAGE(S)

C.E. Morris Co. -vs-
Foley Construction,
54 Ohio St. 2d 279 (1978)-------- 18

State v. Bridgeman,
55 Ohio St. 2d 261 (1978)-------- 22

State v. Carter,
23 Ohio App. 3d 27 (1985)-------- 11

State v. Deboe,
62 Ohio App. 2d 192, 194 (1977)-- 21

State v. Eley,
56 Ohio St. 2d 169 (1978)-------- 22

State v. Jackson,
22 Ohio St. 3d 281 (1986)--------12,13

State v. Long,
53 Ohio St. 2d 91 (1978)---------11,16

State v. Martin,
22 Ohio App. 3d 172 (1983)------- 17

State v. Robbins,
58 Ohio St. 2d 74, 79 (1979)-----15,19

State v. Underwood,
3 Ohio St. 3d 12 (1983)---------- 11

State v. Williams,
51 Ohio St. 2d 112 (1977)--------10-11

TABLE OF AUTHORITIES

PAGE(S)

STATUTES

O.R.C. 2903.02----------2,17
19,21

O.R.C. 2913.51---------- 2

O.R.C. 2941.141---------- 2

RULES

Ohio Rules of Criminal Procedure,

Rule 29(A)---------- 21

STATEMENT OF THE CASE

The Summit County Grand Jury indicted the Petitioner on One Count of Murder, O.R.C. 2903.02, a special felony, with a firearm specification, O.R.C. 2941.141, and Three Counts of Receiving Stolen Property, O.R.C. 2913.51, felonies of the fourth degree.

On December 5, 1988, the Three Counts of Receiving Stolen Property were dismissed and a jury trial concerning the Count of Murder ensued.

On December 12, 1988, the jury found the Petitioner guilty of Murder with the firearm specification. The Court sentenced the Petitioner to fifteen (15) years to life on the Murder charge and three (3) years on the firearm specification. The sentences were ordered to be served consecutively.

The Petitioner appealed his conviction to the Ninth District Court of Appeals which affirmed Petitioner's conviction. The Ohio Supreme Court overruled Petitioner's motion for jurisdiction on January 24, 1990. The Petitioner now seeks a Petition for a Writ of Certiorari from this Court.

STATEMENT OF THE FACTS

In May or June of 1988, Renitta Bushner and her sister, Arlina Kay Ford, drove to the Petitioner's business, Leland's Dairy, and parked the car in the parking lot. Renitta Bushner was the Petitioner's girlfriend of three years. The women exited the car and entered the Petitioner's apartment at 862 Copley Road, Akron, Summit County, Ohio. Ms. Bushner used a key in her possession to open the Petitioner's door and the women entered the apartment. The Petitioner came out of the apartment's only bedroom to talk to the women. The Petitioner became angry at Ms. Bushner, pulled out a pistol, placed it to Ms. Bushner's head, and said he was going to "blow" her brains out. Ms. Ford told Ms. Bushner she had to go and the women left the apartment.

On August 6, 1988, Ms. Bushner, Ms. Ford, and another woman stopped at the Petitioner's apartment. They parked at Leland's Dairy and Ms. Bushner and Ms. Ford went to the apartment. Ms. Bushner used her key to gain access to the apartment. The Petitioner and his son, Leland Phillips, were present. Ms. Ford went to use the restroom and Leland left. Ms. Ford then went into the kitchen, where a conversation between the Petitioner and Ms. Bushner was in progress. The Petitioner picked up a gun from a kitchen cabinet, placed it to Ms. Bushner's head, and reminded her of his previous threat to "blow" her brains out. Ms. Bushner turned and the women left the apartment.

On August 7, 1988, at about 8:00 p.m., the Petitioner and Susie Overstreet went to a bar in Cleveland. They returned to the Petitioner's

apartment after midnight. They found the Petitioner's son, Leland, asleep on the couch. Without awaking the boy, the couple entered the bedroom. The Petitioner and Ms. Overstreet removed their outer garments and laid on the bed smoking marijuana and watching pornographic films.

In the early morning hours of August 8, 1988, Renitta Bushner entered the Petitioner's apartment, using the key she had in her possession. She headed toward the bedroom. Ms. Bushner looked into the bedroom, saw the semi-nude couple on the bed, and closed the door. After seeing Ms. Bushner, the Petitioner and Ms. Overstreet jumped to the door and held it shut as Ms. Bushner attempted to reopen it. The Petitioner went into the hallway. Ms. Overstreet heard what sounded like a scuffle and the Petitioner reentered the bedroom.

The Petitioner told Ms. Overstreet that Ms. Bushner had a knife and was trying to stab him. The Petitioner went to a dresser, pulled out a gun, opened the door, and went out. The Petitioner backed into the bedroom and with the gun pointed at the floor fired it. Up to this point, Ms. Overstreet had seen Ms. Bushner only once, when Ms. Bushner had first looked into the bedroom. Ms. Overstreet never saw Ms. Bushner with a knife.

Ms. Overstreet looked out the bedroom door and saw Ms. Bushner lying on her left side with her legs curled up. Ms. Overstreet telephoned the ambulance from the bedroom. Ms. Overstreet then went to leave the apartment but the Petitioner told her to stay. Leland and Ms. Overstreet sat in the living room to wait for the authorities, leaving the Petitioner alone with Ms. Bushner. The

Petitioner called Ms. Overstreet into the kitchen. The Petitioner had moved Ms. Bushner's body. When Ms. Overstreet entered the kitchen she saw the Petitioner pick up a knife out of the sink. The Petitioner asked Ms. Overstreet what he should do with the knife. The Petitioner laid the knife next to Ms. Bushner's leg.

Officer Clifton B. Gray, Officer Beth James, Officer Lionel S. Millender, and Detective Clifton B. Gray, all of the Akron Police Department, responded to the call and went to the Petitioner's apartment. The Petitioner told the officers he had shot Ms. Bushner, repeating it several times. The officers took the Petitioner into custody.

ARGUMENTS WHY WRIT SHOULD NOT BE ALLOWED.

I. AN APPELLATE COURT WILL NOT CONSIDER AN ERROR WAIVED AT THE TRIAL LEVEL UNLESS THE PETITIONER ESTABLISHES PLAIN ERROR.

II. AN APPELLATE COURT WILL NOT REVERSE A JURY'S VERDICT WHICH IS NOT CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE AND IS BASED UPON SUFFICIENT EVIDENCE.

ARGUMENT I

I. AN APPELLATE COURT WILL NOT CONSIDER AN ERROR WAIVED AT THE TRIAL LEVEL UNLESS THE PETITIONER ESTABLISHES PLAIN ERROR.

The Petitioner claims the trial court committed plain error in failing to give a jury instruction that he had no duty to retreat in his own home. Although the State admits this instruction may have been helpful to the jury, the error did not prejudice the Petitioner and does not amount to plain error.

First, the State notes the Petitioner did not object to the trial court's instructions on the duty to retreat or request a special instruction. The general rule is that an Appellate Court will not consider any assigned error which could have been, but was not, called to the trial court's attention while such error was still avoidable or correctable. State v. Williams, 51 Ohio

St. 2d 112 (1977). The Petitioner's failure to give the trial court notice of the error in the instruction places a high burden on the Petitioner to show that, but for the error, the outcome of the trial clearly would have been otherwise. State v. Long, 53 Ohio St. 2d 91 (1978). The plain error rule is to be applied with utmost caution and used only in those exceptional circumstances where the plain error rule is necessary to prevent a manifest miscarriage of justice. State v. Underwood, 3 Ohio St. 3d 12 (1983); State v. Long, supra; State v. Carter, 23 Ohio App. 3d 27 (1985).

The State first contends the evidence presented by the Petitioner failed to establish that the Petitioner was in imminent danger of death or great bodily harm from Ms. Bushner and a jury instruction on self-defense should not

have been given. In State v. Jackson, 22 Ohio St. 3d 281 (1986), the Ohio Supreme Court addressed the issue of the duty to retreat in a similar case:

> The trial court instead gave a correct general instruction on self-defense in accordance with the elements enumerated in Robbins supra. Appellant contends this was error because the trial court, in overruling his proposed instruction, failed to sua sponte specially instruct the jury that he had no duty to retreat when attacked in or about his home.
>
> In State v. Guster (1981), 66 Ohio St. 2d 266, 271 [20 O.O.3d 249], this court stated that "*** a court's instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings." In the case sub judice, a special instruction on appellant's duty to retreat when attacked in or about his home may have been helpful to the jury. Our review of the record, however, convinces us that the omission of such an instruction was not prejudicial error requiring reversal under the facts of this case.

> As made clear by this court in Robbins, supra the elements of self-defense are cumulative. In order to prevail on the issue of self-defense, the accused must show that he was not at fault in starting the affray, and that he had a bona fide belief that he faced imminent danger of death or great bodily harm and that his only means of escape was the use of such force, and that he violated no duty to retreat or avoid the danger. If the defendant fails to prove any one of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense.
>
> Id. at 284.

In Jackson the court concluded that any error in the trial court's instruction to the jury on self-defense did not prejudice the defendant as he failed to establish the element of imminent danger by a preponderance of the evidence. Id. at 285.

In the case at bar, the trial court's instruction on self-defense did not prejudice the Petitioner since the

Petitioner did not establish the other elements of self-defense. The State contends the Petitioner's testimony on self-defense is not credible based on the physical and medical evidence in this case. The Petitioner's version of the facts was contradicted by the testimony of an eyewitness and the Coroner. Dr. William Cox testified that the physical evidence and surrounding circumstances show Ms. Bushner had to be lying on the ground and the Petitioner had to be standing over her head when he shot her in order for the bullet to take the head to foot path it took once it entered her skull. This testimony was supported by the eyewitness testimony of Ms. Overstreet. The testimony of Ms. Overstreet was that the Petitioner was pointing at the ground when he fired the gun. Further, the Petitioner claimed Ms. Bushner attacked him with a knife.

However, Ms. Overstreet, a disinterested eyewitness, saw the Petitioner take the knife from the kitchen sink and place it by Ms. Bushner's leg shortly after the murder was committed. The Petitioner's fingerprint was found on the knife.

The record supports the State's contention that Ms. Bushner did not place the Petitioner in fear of imminent danger of death or great bodily harm as Ms. Bushner did not have any weapon and was lying on the floor when shot. At trial the Petitioner bears the burden of establishing the elements of self-defense by a preponderance of the evidence. State v. Robbins, 58 Ohio St. 2d 74 (1979). Further, the Petitioner's failure to notify the trial court of the error in the instruction places a high burden on the Petitioner to show that, but for the error, the outcome of the trial would clearly have been different.

State v. Long, supra. The Petitioner has failed to establish he was in fear of imminent danger of death or great bodily harm. Therefore, the State contends the Petitioner has failed to establish that, but for the error in the jury instruction on the duty to retreat, the jury would have found self-defense and returned a judgment of an acquittal.

Based on the foregoing arguments, the State contends the Petitioner has failed to establish plain error. His claims are without merit and his petition should be denied.

ARGUMENT II

II. AN APPELLATE COURT WILL NOT REVERSE A JURY'S VERDICT WHICH IS NOT CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE AND IS BASED UPON SUFFICIENT EVIDENCE.

The Petitioner contends that his conviction for Murder, Ohio Revised Code Section 2903.02, was contrary to the manifest weight of the evidence. The State submits that the Petitioner is asking this court to retry issues of fact. It is a well settled proposition of law in Ohio that Appellate Courts will not perform this function. The Petitioner's contention is without merit and should be dismissed.

In State v. Martin, 22 Ohio App. 3d 172 (1983), the court set forth the following test in determining whether the jury's verdict was against the manifest weight of the evidence:

> In considering the claim that the conviction was against the manifest weight of

> the evidence, the test is much broader. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.

The Petitioner asserts that his conviction for the murder of Renitta Bushner was clearly against the manifest weight since he established the defense of self-defense. A verdict supported by some evidence going to the essential elements of the crime will not be reversed as against the manifest weight of the evidence. C.E. Morris Co. v. Foley Construction, 54 Ohio St. 2d 279 (1978).

Ohio Revised Code Section 2903.02 sent forth the following elements of murder:

> (A) No person shall purposely cause the death of another.
>
> (B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

In State v. Robbins, 58 Ohio St. 2d 74, 79 (1979), the court set forth the elements of self-defense:

> (1) The slayer was not at fault in creating the situation giving rise to the affray, ***(2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force, ***(3) the slayer must not have violated any duty to retreat or avoid the danger, ***." (citations omitted.)

In the case at bar, The Petitioner had twice previously threatened Ms. Bushner with a gun. Medical and eyewitness testimony established that

when the Petitioner shot Ms. Bushner she was lying on the floor and the Petitioner stood over her head and aimed downward when he shot her. Testimony also showed Ms. Bushner had no weapon when the Petitioner shot her and that the Petitioner placed a knife next to Ms. Bushner's body after he shot her. Based on the evidence and testimony the jury saw and heard, it found the Petitioner guilty of the murder of Renitta Bushner. The jury's finding is supported by the record. The Petitioner's contention that the convictions were against the manifest weight of the evidence is without merit and should be dismissed.

The Petitioner also contends the trial court should have granted his motion for acquittal. The Petitioner has waived any error regarding the trial court's ruling on his motion for

acquittal.

An accused waives his right to a directed verdict of acquittal at the close of the State's case by thereafter introducing evidence and failing to renew the motion at the close of all of the evidence. State v. Deboe, 62 Ohio App. 2d 192, 194 (1977). The Petitioner made his Criminal Rule 29(A) motion at the close of the State's case. The Petitioner presented evidence on his own behalf. He did not renew his motion upon resting his case. Therefore, the Petitioner waived his right to a directed verdict of acquittal.

Assuming arguendo that the court finds the Petitioner did not waive his Criminal Rule 29(A) motion, the State submits that it presented substantial and credible evidence from which the jury could reasonably conclude that the Petitioner committed Murder in violation

of Ohio Revised Code Section 2903.02. The Court properly overruled the Petitioner's motion for acquittal since reasonable minds could reach different conclusions as to whether each material element of the crimes had been proven beyond a reasonable doubt. State v. Bridgeman, 55 Ohio St. 2d. 261 (1978).

The State submits that the Petitioner's conviction for murder was supported by sufficient evidence beyond a reasonable doubt. State v. Eley, 56 Ohio St. 2d 169 (1978). The Petitioner's arguments are without merit and should be dismissed.

CONCLUSION

Based on the foregoing arguments, the Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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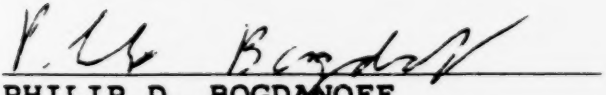

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A P P E N D I X

O.R.C. 2903.03 Voluntary Manslaughter

(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of voluntary manslaughter, an aggravated felony of the first degree.

O.R.C. 2913.51 Receiving Stolen Property

(A) No person shall receive, retain, or dispose of property of another, knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.

(B) Whoever violates this section is guilty of receiving stolen property. If the value of the property involved is less than three hundred dollars, receiving stolen property is a misdemeanor of the first degree. If the value of the property involved is three hundred dollars or more and is less than five thousand dollars, if the property involved is any of the property listed in section 2913.71 of the Revised Code, or if the offender previously has been convicted of a theft offense, receiving stolen property is a felony of the fourth degree. If the property involved is a motor vehicle, as defined in section 4501.01 of the Revised Code, if the value of the property involved is five thousand dollars or more and is less than one hundred thousand dollars, or if the offender previously has been convicted of two or more theft offenses, receiving stolen property is a felony of the third degree. If the value of the property involved is one hundred thousand dollars or more, receiving stolen property is a felony of the second degree.

O.R.C. [2941.141] Section 2941.141
[Specification that offender had a firearm while committing the offense.]

(A) Imposition of a term of actual incarceration upon an offender under division (A) of section 2929.71 of the Revised Code for having a firearm on or about his person or under his control while committing a felony is precluded unless the indictment , count in the indictment, or information charging the offense specifies that the offender did have a firearm on or about his person or under his control while committing the offense. A specification to an indictment, count in the indictment, or information charging the offender with having a firearm on or about his person on under his control while committing a felony shall be stated at the end of the body of the indictment, count, or information, and shall be in substantially the following form:

Specification (or, Specification to the First Count). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about his person or under his control while committing the offense).

(B) As used in this section, "firearm" has the same meaning as in section 2923.11 of the Revised Code.

Ohio Rules of Criminal Procedure
Rule 29(A)

(A) Motion for Judgment of acquittal. The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.